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18 IN THE UNITED STATES DISTRICT COURT FOR THE
19 SOUTHERN DISTRICT OF CALIFORNIA

20 LEEDS, L.P.,) Civil No. 08-cv-0100-BTM-BLM
21 Plaintiff,)
22 v.) UNITED STATES' TRIAL BRIEF
23 UNITED STATES OF AMERICA,)
24 Defendant.)
25 _____)

26 I. INTRODUCTION

27 The tax liabilities underlying the federal tax liens at issue in this case arose from notices of
28 deficiency issued to Don and Susanne Ballantyne (the Ballantynes) for their 1985, 1986, 1990 and 1997
tax years for unpaid federal income taxes. On the dates of the assessments for these tax years and after
notice and demand and failure to pay, statutory liens arose which attached to all property and rights to
property of the Ballantynes, including the property described below. 26 U.S.C. § 6321. In anticipation
of these liens the Ballantynes transferred certain real property in San Diego, located at 3207 McCall
Street, San Diego, CA 92106 ("the McCall Property") to an entity, Leeds LP, they formed during the
pendency of a Tax Court trial concerning the 1985 and 1986 tax liabilities which comprise the bulk of

1 the liabilities. As the nominee of the Ballantynes, they continued to control Leeds LP through the
 2 relevant dates in this case.

3 A Notice of Federal Tax Lien specifically identifying the nominee relationship at issue here was
 4 recorded against Plaintiff's property, as nominee of the taxpayers, including the McCall Property, in
 5 order to put third parties on notice that the liens against the Ballantynes attached to the McCall Property.
 6 On January 17, 2008, Plaintiff, the nominal record title holder, filed this action seeking to quiet title to
 7 the McCall Property, asking the Court to find the tax liens encumbering the Ballantynes' property do not
 8 encumber the McCall Property. The United States contends that the federal tax liens at issue did attach
 9 to the McCall Property, and remain attached thereto, and as such Plaintiff is not entitled to quiet title to
 10 the McCall Property.

II. ARGUMENT

A. Plaintiff is the Ballantynes' Nominee

13 "A nominee is one who holds bare legal title to property for the benefit of another." *Scoville v.*
 14 *United States*, 250 F.3d 1198, 1202 (8th Cir. 2001). The nominee doctrine "stems from equitable
 15 principles." *Richards v. United States (In re Richards)*, 231 B.R. 571, 578 (E.D. Pa. 1999). "Focusing
 16 on the relationship between the taxpayer and the property, the [nominee] theory attempts to discern
 17 whether a taxpayer has engaged in a sort of legal fiction, for federal tax purposes, by placing title to
 18 property in the hands of another while, in actuality, retaining all or some of the benefits of being the true
 19 owner." *Id.* Whether a person or entity holds property as a nominee of a taxpayer "is determined by the
 20 degree to which a party exercises control over an entity and its assets." *See United States v. Bell*, 27 F.
 21 Supp. 2d 1191, 1195 (E.D. Cal. 1998) (citing *Shades Ridge Holding Co., Inc. v. United States*, 888 F.2d
 22 725, 729 (11th Cir. 1989), and *LiButti v. United States*, 107 F.3d 110, 119-20 (2d Cir. 1997)). The burden
 23 is on the United States to prove by a preponderance of the evidence that Plaintiff is the Ballantynes'
 24 nominee. *See United States. v. Vaagen*, 2006 WL 2435029, 7 (E.D. Wash. 2006).

1. Plaintiff Is the Ballantynes' Nominee under the Federal Nominee Factors

25 This Court has held that California recognizes that an entity may nominally hold title for another.
 26 See Docket entry # 89. Moreover, this Court has held that as California courts have not flushed out the
 27 exact contours for application of the nominee principle, this Court may look to the federal common law
 28 on nominees to supply the factors. *See* Docket entry # 89; *see also United States v. May*, 2007 WL

1 3287513, at *2, 100 A.F.T.R.2d 2007-6602 (11th Cir. Nov. 8, 2007) (per curiam) (slip copy) (citing
 2 *Battle v. United States*, 2007 WL 1424553, at *5 (E.D. Tex. Feb. 7, 2007); *Cody v. United States*, 348 F.
 3 Supp. 2d 682, 694 (E.D. Va. 2004); *Towe Antique Ford Found. v. I.R.S.*, 791 F. Supp. 1450, 1454 (D.
 4 Mont. 1992), *aff'd on other grounds*, 999 F.2d 1387 (9th Cir.1993); *Grippo v. Perazzo*, 357 F.3d 1218,
 5 1222 (11th Cir. 2004)); *Scoville v. United States*, 250 F.3d 1198, 1202 (8th Cir. 2001); *United States v.*
 6 *Fields*, 2009 WL 605775, at *5, 103 A.F.T.R.2d 2009-1271 (S.D. Miss. Mar. 9, 2009). Whether a
 7 certain level of control over land or goods as established by state law “constitutes ‘property’ or ‘rights to
 8 property’ is a matter of federal law.” *Drye v. United States*, 528 U.S. 49, 58 (1999) (quoting *United*
 9 *States v. Nat'l Bank of Commerce*, 472 U.S. 713, 727 (1985)).

10 Factors considered by federal courts in a nominee determination include: “(a) No consideration
 11 or inadequate consideration paid by the nominee; (b) Property placed in the name of the nominee in
 12 anticipation of a suit or occurrence of liabilities while the transferor continues to exercise control over
 13 the property; (c) Close relationship between transferor and the nominee; (d) Failure to record
 14 conveyance; (e) Retention of possession by the transferor; and (f) Continued enjoyment by the transferor
 15 of benefits of the transferred property.” See *Towe Antique Ford Foundation v. I.R.S.*, 791 F.Supp. 1450,
 16 1454 (D. Mont. 1992), *aff'd on other grounds*, 999 F.2d 1387 (9th Cir.1993)); see also *May v. United*
 17 *States*, 2007 WL 3287513 (11th Cir. 2007). All of these factors apply to the present case. The
 18 Ballantynes transferred the McCall Property to a limited partnership, Leeds LP, which they controlled
 19 and which was owned exclusively by trusts for members of the Ballantyne family. The transfer occurred
 20 after taxes were assessed against the Ballantynes and approximately one month after the Ballantynes
 21 were in trial in the United states Tax Court challenging approximately \$1 million in additional proposed
 22 deficiencies. Despite the transfer of the McCall Property, the Ballantynes continued to live in the McCall
 23 Property and enjoyed the use of the property. In addition, the transfer of the McCall Property was for no
 24 or inadequate consideration as the Ballantynes devised a series of transaction through which they
 25 purported to divest themselves of ownership of the McCall Property while avoiding receipt of financial
 26 compensation.

27 **2. Plaintiff Is the Ballantynes' Nominee under State Law Factors**

28 This Court has also ruled that in addition to the proving its case pursuant to the federal nominee
 factors, the United States may also use state law theories to demonstrate th Ballantynes have an interest

1 in the McCall Property. *See* Docket entry # 89. Thus, even assuming for the sake of argument that
 2 California did not recognize the concept of nominee, as long as the United States can demonstrate that it
 3 has an interest in the McCall Property pursuant to California law, then this Court can still apply the
 4 nominee factors discussed above to determine whether Plaintiff is the Ballantynes' nominee. State law
 5 theories that would establish the United States' interest in the McCall Property include fraudulent
 6 transfer (discussed *infra* Section B.2) and alter ego.

7 **B. Plaintiff Is Not A Subsequent Purchasers of the McCall Property**

8 **1. 26 U.S.C. § 6323 Does Not Protect Plaintiff If it Is the Ballantyne's Nominee**

9 By definition if Plaintiff is found to be the Ballantyne's nominee, it cannot be a "purchaser" of
 10 the McCall Property as contemplated by 26 U.S.C. § 6323(a). Pursuant to section 6323(h)(6) states in
 11 part, a "purchaser" is defined as "a person who, for adequate and full consideration in money or money's
 12 worth, acquires an interest (other than a lien or security interest) in property. . ." The United States'
 13 claim that Plaintiff is a nominee seeks to dispose of any pretense that Plaintiff and the Ballantynes are
 14 separate and distinct and that there was any exchange for value of the McCall Property. As one Court
 15 stated:

16 Focusing on the relationship between the taxpayer and the property, the
 17 [nominee] theory attempts to discern whether a taxpayer has engaged in a sort
 18 of legal fiction, for federal tax purposes, by placing legal title to property in
 19 the hands of another while, in actuality, retaining all or some of the benefits
 20 of being the true owner. Said another way, the nominee theory is utilized to
 21 determine whether property should be construed as belonging to the taxpayer
 22 if he/she treated and viewed the property as his/her own, in spite of the legal
 23 machinations employed to distinguish legal title to the property.

24 *In re Richards*, 231 B.R. 571, 578 (E.D. Pa. 1999). As this Court has previously recognized, a party who
 25 is a nominee cannot be a purchaser as the taxpayer has not relinquished their ownership interest. *See*
 26 Docket entry # 89. Thus, because, as explained above, Plaintiff is the nominee of the Ballantynes,
 27 Plaintiff cannot be a purchaser of the McCall Property under 26 U.S.C. § 6323(a).

28 **2. Even If Plaintiff Is Not the Ballantynes' Nominee, it Is Not a Purchaser under 26
 U.S.C. § 6323**

Pursuant to section 6323(h)(6), a "purchaser", in addition to providing adequate consideration for
 property (which Leeds failed to do), must acquire an interest in property that is valid under local law. If
 property is acquired due to a fraudulent transfer, then it is not a valid transfer under California law. The
 inquiry pursuant to the California Uniform Fraudulent Transfer Act ("CUFTA") §§ 3439 *et seq.*, is

1 whether a transfer of an asset or interest by the debtor to a third person undertaken with the intent to
 2 prevent a creditor from reaching the transferred interest to satisfy its claim.

3 A transfer is fraudulent, both as to present and future creditors, when it is
 4 made “[w]ith actual intent to hinder, delay, or defraud any creditor of the
 5 debtor.” Even absent actual fraudulent intent, a transfer may be deemed
 6 fraudulent if the debtor did not receive “a reasonably equivalent value in
 7 exchange for the transfer” and “the debtor was insolvent at that time or the
 8 debtor became insolvent as a result of the transfer or obligation.”

9 *Shafrir v. Nicherie*, 2008 WL 1735519, at *3 (Cal. Ct. App. 2008) (quoting *Mejia v. Reed*, 74 P.3d 166,
 10 170 (Cal. 2003)); *see also* CUFTA §§ 3439.04 - 3439.05.

11 Under the CUFTA, a creditor of the transferor may avoid a transfer if it was a result of the fraud
 12 of the transferor. The CUFTA provides several remedies to a wronged creditor, including avoidance of
 13 the transfer, attachment against other assets of the fraudulent transferee, and any other relief that the
 14 circumstances may require. CUFTA § 3439.07. In sum, establishing a fraudulent transfer under the
 15 CUFTA requires the showing of: (1) creditor status, (2) a property transfer, and (3) actual or constructive
 16 fraud on the part of the transferor.

17 The Ballantynes fraudulently transferred the McCall Property to Plaintiff. The IRS was a creditor
 18 of the Ballantynes when the McCall Property was transferred. Moreover, the IRS stood to increase the
 19 amount of the assessed liabilities significantly at the time of the transfer. In addition there was both
 20 actual and constructive fraud. The Ballantynes intended to defraud the IRS as they did not want to have
 21 to pay their tax liabilities. Furthermore, there was constructive fraud because, as discussed above in
 22 Section A.1, the Ballantynes transferred the McCall Property for little or no consideration, and as a result
 23 of the series of transfers of property engaged in by the Ballantynes, including that of the McCall Property
 24 and the other significant assets they owned, they endeavored to render themselves insolvent.

25 Because the Ballantynes’ transfer of the McCall Property was done with “actual intent to hinder,
 26 delay, or defraud” the IRS, and the transfer was made for little or no consideration in a manner that
 27 rendered the Ballantynes insolvent, the transfer was fraudulent under either prong of the CUFTA. Thus,
 28 because the transfer is not valid under local law, Plaintiff cannot be a purchaser of the McCall Property
 under 26 U.S.C. § 6323 and is not entitled to the statute’s protections. *See Sumpfer v. United States*, 314
 F. Supp. 2d 684, 686 (E.D. Mich. 2004).

CONCLUSION

The law and evidence at trial will establish that the United States' liens attached to the McCall Property because at all relevant times Plaintiff held the property as a nominee of Ballantynes. Moreover, because the transfer of the property was fraudulent under the CUFTA, Plaintiff is not entitled to the protections under 26 U.S.C. § 6323, and cannot therefore quiet title in the McCall Property to the exclusion of the IRS liens.

DATED this 6th day of December, 2010.

Respectfully submitted,

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1 CERTIFICATE OF SERVICE
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6 I HEREBY CERTIFY that on this 6th day of December, 2010, I electronically filed the foregoing
7 with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the
8 following: Edward C Walton. ewalton@kayerose.com; Andre M Picciurro apicciurro@kayerose.com.
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10 /s/ Lauren Castaldi
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12 Trial Attorney, Tax Division
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